

It is clear that the claimant violated the respondent's workplace violence policy by threatening to punch Mr. Fisher. This led to the claimant's termination. The claimant is currently on work restrictions of sedentary work only. The claimant does not believe that the respondent could accommodate those restrictions. Mr. Penrod stated that the claimant could have been placed in the feed mill, loading trucks. He would have had to run toggle switches which could be done from a seated position.

It is found that the claimant was terminated for cause. It is also found that the dispatcher position would qualify as a sedentary position. Therefore, the claimant's request for temporary total disability compensation from March 10th, 2014 and continuing should be and the same is hereby denied.¹

Claimant alleges he was wrongfully terminated for violating respondent's policy against workplace violence, as he was acting in self-defense when verbally confronting his supervisor. Claimant asserts respondent never offered him accommodated work he could perform.

Respondent contends claimant's application for review should be dismissed for lack of jurisdiction, pursuant to K.S.A. 2013 Supp. 44-534a(a)(2). In the alternative, respondent maintains the ALJ's Order should be affirmed.

The issues for Board review are:

1. Does the Board have jurisdiction to review the ALJ's preliminary hearing Order?
2. Is claimant entitled to temporary total disability (TTD) compensation?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant worked for respondent as a pen rider. Claimant alleges he fractured his right lower extremity and injured his back when the horse he was riding slipped and fell.

Respondent has a policy against workplace violence. Claimant asserts he complained to his supervisor on February 17, 2014, about two horses being kept in a stall designed for one horse. Claimant contends he was yelled at by his supervisor and backed up against a wall. According to claimant, he attempted to walk away from his supervisor two to four times, but the supervisor would not desist the harassment and intimidation. Claimant testified he told his supervisor, "[O]ne of these days we're going to be in the bar and this is going to come up. We're going to be talking about it and I'm going to punch you in the mouth because of it."² Claimant was then discharged by respondent. It is unnecessary to discuss the supervisor's version of events, which differs substantially from that of claimant.

¹ ALJ Order at 5.

² P.H. Trans. at 11.

On March 10, 2014, claimant was restricted to sedentary work. Respondent would have provided claimant with a job within his restrictions, had he not been terminated for cause.

PRINCIPLES OF LAW AND ANALYSIS

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only those issues listed in K.S.A. 2013 Supp. 44-534a(a)(2). Those issues are: (1) did the employee suffer an accident, repetitive trauma or resulting injury, (2) did the injury arise out of and in the course of the employee's employment, (3) was notice given, or (4) whether certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the claim under the Workers Compensation Act.³ The Board can also review preliminary decisions when a party alleges the ALJ exceeded his or her jurisdiction.⁴

The issues of whether a worker is entitled to TTD, and the amount of the weekly TTD benefit, are not generally considered jurisdictional. An issue regarding whether a worker is entitled to TTD is fully within the authority granted to ALJs.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁵

K.S.A. 2013 Supp. 44-510c(b)(2)(C) provides:

If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

The Board has made similar rulings in the recent past.⁶ Since the review requested by claimant does not raise an issue of compensability enumerated in K.S.A. 44-534a(a)(2)

³ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁴ K.S.A. 2013 Supp. 44-551(l)(2)(A).

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

⁶ See *Beaver v. Spangles*, No. 1,067,204, 2014 WL 517253 (Kan. WCAB Jan. 16, 2014), *Ramirez v. Murfin Drilling Co., Inc.*, No. 1,061,372, 2014 WL 889872 (Kan. WCAB Feb. 10, 2014) and *Willis v. Clearview City*, No. 1,067,116, 2014 1340598 (Kan. WCAB Mar. 24, 2014)

and there has been no showing the ALJ exceeded her authority, the application for Board review must be dismissed for lack of jurisdiction.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, the undersigned Board Member finds claimant's request for Board review of the May 13, 2014, preliminary hearing Order Denying Compensation entered by ALJ Fuller is dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Dated this ____ day of July, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge

⁷ K.S.A. 2013 Supp. 44-534a.

⁸ K.S.A. 2013 Supp. 44-555c(j).